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The Commerce Clause of the Constitution, U.S. CONST. art I., § 8, cl. 3, provides in relevant part:

> The Congress shall have the Power . . . To regulate Commerce . . . among the several States.

Ohio Revised Code ("O.R.C.") § 5733.33, as in effect when the credit at issue was granted, is reproduced in the Petition Appendix ("Pet. App.") at 32a–43a. (The Petition Appendix was filed in No. 04-1704).

INTRODUCTION

In this case, the Respondents seek, and the court below adopted, an unprecedented understanding of the negative Commerce Clause as applied to state taxes—a Commerce Clause theory that Respondents themselves candidly called "novel"—and one that threatens to eviscerate the States' ability to foster economic development. At issue here is Ohio's Investment Tax Credit ("ITC"), a business tax credit that the court below admitted is "equally available to in-state and out-of-state businesses." The ITC provides a credit against Ohio's corporate franchise tax to *any* company—whether currently operating in Ohio or not—that makes a new capital investment in the State. In offering this credit, Ohio is by no means unique. Virtually every State in the nation has used some such incentive for decades as part of its economic development efforts. The court below nonetheless found that this long-standing, widespread and well-established state economic development practice violates the negative Commerce Clause's anti-discrimination principle. The court's result, however, rests on a fundamentally flawed understanding of that principle—an understanding that has dire consequences for the States' exercise of their "indispensable power of taxation," *Northwestern States Portland Cement Co. v. Minn.*, 358 U.S. 450, 457 (1959), and their ability to engage in the "competition [that] lies at

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–17a) is reported at 386 F.3d 738 (6th Cir. 2004). The order of the court of appeals denying rehearing (Pet. App. 31a) is unreported. The opinion and order of the district court (Pet. App. 18a–30a) is reported at 154 F. Supp. 2d 1196 (N.D. Ohio 2001). The order of the district court denying remand to state court (J.A. 72a–80a) is unreported.

JURISDICTIONAL STATEMENT

The Court directed the parties to address whether Respondents have standing to challenge Ohio's investment tax credit. Petitioners believe that Respondents do not.

DaimlerChrysler, with the Ohio Petitioners' consent, removed Respondents' state-court suit to federal district court under 28 U.S.C. § 1441. The district court had federal question jurisdiction under 28 U.S.C. § 1331. The court of appeals had jurisdiction under 28 U.S.C. § 1291 to review the district court's final judgment. The court of appeals entered judgment on October 19, 2004, and denied rehearing en banc on January 18, 2005. Petitioner timely filed a writ of certiorari on June 17, 2005 (in compliance with Justice Stevens's April 7, 2005 order extending the time for filing). The Court granted the petition on September 27, 2005. 126 S. Ct. 36 (2005). The Court also granted the petition in No. 04-1704, which also arose from the case below; the Court has consolidated that case with this one for oral argument. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, of the Constitution provides in relevant part:

> The judicial Power shall extend to [ ] Cases . . . [and] Controversies.

the heart of free trade policy," *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 337 (1977).

What the court below failed to appreciate is that the negative Commerce Clause prohibits barriers, not welcome mats. That is, the negative Commerce Clause is an anti-protectionist measure that prevents States from erecting barriers that make it more difficult either for out-of-state products, services, or competitors to come into the State, or for in-state products, services, or competitors to leave the State. So, for example, the Court has neither hesitated to strike transactional taxes that act as tariffs, nor has it countenanced "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996).

Nothing in the Court's negative Commerce Clause jurisprudence, however, even remotely suggests that States cannot lay out welcome mats, i.e., adopt programs or policies designed to "encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch*, 429 U.S. at 336. Indeed, the Court has noted that "it is a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State." *Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 385 (1991).

The ITC is Ohio's effort to pursue that "laudatory goal." Far from "economic protectionism," the tax credit is freely available to all who invest in Ohio, whether already here or new to the State. And unlike a tariff, it does not seek to impose an ongoing burden on those who elect to place their facilities elsewhere. Rather it merely provides a one-time benefit, akin to a subsidy, to those who locate their facility in the State. That is, as its name suggests, it provides *incentives*, not *penalties*, and does so in a manner that fully comports with negative Commerce Clause constraints.

Of course, it should go without saying that these incentives, and the ability to offer them, are of vital importance to Ohio and other States. Respondents claim that they are saving the States from themselves. That is, they proceed from the mistaken belief that the States compete only with one another, so that prohibiting all States from offering these incentives might actually help the States by relieving them of the need to compete against one another with such incentives. But this argument simply ignores that Ohio competes for business investment not only with Tennessee, but also with Taiwan. A constitutional rule that equally disables Ohio and Tennessee leaves both at the mercy of foreign competitors. The Constitution is not an economic suicide pact among the States. The Court should not turn it into one here.

Worse still, this radical attack on mainstream state policy was achieved in a case that federal courts should not have even heard, as the Respondents here lack standing to attack Ohio's tax laws in federal court. Most of Respondents claim standing only as disgruntled taxpayers, but the Court has long rejected generalized taxpayer standing as a basis for challenging state tax measures. Other Respondents allege harms suffered when the City of Toledo took their property through eminent domain in order to facilitate DaimlerChrysler's plant expansion—an expansion that those Respondents say would not have occurred but for the ITC. But this alleged injury fails to satisfy either Article III or prudential standing requirements. As to the former, Respondents have various problems both with causation and redressability. As to the latter, "injuries" such as this are not within the zone of interests the negative Commerce Clause is designed to protect.

Accordingly, the Court should vacate the lower court's decision on the ITC because Respondents lack standing. If, on the other hand, standing exists, the ITC decision should be reversed on the merits.

STATEMENT OF THE CASE

Respondents attack Ohio's ITC, which provides a credit for new investment in the State. But Ohio's ITC is not unique. Thirty-seven States currently offer similar credits, and the Sixth Circuit did not rely on any unique aspect of Ohio's program in striking it down. Moreover, even among those States without an ITC, the vast majority offer some form of credit, such as jobs incentives credits, that could fall victim to the broad language of the decision below.[1]

Respondents' standing and the merits of their claims are both at issue here. Addressing those issues requires a brief description of four separate sets of facts: the DaimlerChrysler investment that led to the suit below, the operation of Ohio's ITC, the identity of the Respondents and their asserted harms, and the proceedings below.

A. This suit arose after DaimlerChrysler was offered tax breaks to undertake a $1.2 billion expansion of its Jeep plant in Toledo.

In 1998, DaimlerChrysler agreed to invest nearly $1.2 billion in modernizing and expanding a Jeep plant located in Toledo. J.A. 22a (Complaint ("Compl.") ¶¶ 18, 19). DaimlerChrysler also agreed to retain 4,200 jobs at the plant, with an estimated payroll of $197,736,000 per year. See Compl., Ex. 4.04 to Ex. A, at 3, available at Court of Appeals J.A. 74, No. 01-3960.

As part of that agreement, DaimlerChrysler became eligible for certain tax incentives that apply to its property taxes and its Ohio corporate franchise tax. In particular, with regard to the latter, the investment made DaimlerChrysler eligible for an investment tax credit it could use to offset its corporate franchise tax liability. See O.R.C. § 5733.33. As

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[1] For statutory references to the credits offered by other States, see Petition at 22 n. 5.

further detailed below, because the area in question qualified as a "distressed area" within the State, DaimlerChrysler received an investment tax credit of 13.5 percent of its new investment. Respondents allege that DaimlerChrysler received a total of $281 million in tax incentives.[2] J.A. 24a (Compl. ¶ 24).

B. Ohio's ITC is a one-time credit that Ohio offers against its corporate franchise tax for new in-state business investment.

The ITC, which is the tax provision at issue here, provides a one-time credit against Ohio's corporate franchise tax to any company that makes a qualifying investment in the State. See O.R.C. § 5733.33.[3] Thus, fully understanding the ITC requires a brief explanation of both the corporate franchise tax and the credit that the ITC provides against that tax.

1. Ohio's corporate franchise tax is "an excise tax levied upon corporations for the privilege of doing business in the state." See generally *Wesnovtek Corp. v. Wilkins*, 825 N.E.2d 1099, 1100 (Ohio 2005); O.R.C. § 5733.01(A) (the corporate franchise tax statute). The corporate franchise tax aims "to tax the fair value of business done in Ohio." *Rio Indal, Inc. v. Lindley*, 405 N.E.2d 291, 292 (Ohio 1980).

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[2] This total includes property tax incentives and other incentives not at issue here.

[3] Ohio has recently begun phasing out its corporate franchise tax and has discontinued offering new credits under the ITC. Ohio is replacing the revenue stream with a new tax based on gross receipts. Nevertheless, corporate taxpayers will continue to benefit from the ITC during the phase-out period. See O.R.C. §§ 5733.33(B)(1), 122.173.

The citations in this brief, with the exception of the statutes cited in the previous sentence of this footnote, are to the statutes in effect at the time DaimlerChrysler made its investment. These statutes are reprinted for convenience at Pet. App. 32a–43a.

With respect to a corporation that conducts business in more than one State, Ohio uses the traditional three-factor apportionment formula to determine what portion of the corporation's "business income" is attributable to its activities in Ohio, and thus subject to Ohio taxation. See O.R.C. § 5733.05. See also *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 170 (1983) (referring to the three-factor test as "a benchmark against which other apportionment formulas are judged"). That formula apportions income to Ohio based on the percentage of an interstate business's property, payroll, and sales that are within the State, with the property and payroll factors each constituting 20 percent, and the sales factor constituting 60 percent, of the final apportionment factor. O.R.C. § 5733.05(B).

Two effects follow immediately from this apportionment method. First, an interstate business that installs new manufacturing machinery and equipment in an Ohio location and operates that installation as part of its interstate business will typically increase the extent to which it is subject to Ohio taxation. The new investment increases both the Ohio "property factor" and the Ohio "payroll factor" (assuming new employees are hired to operate the new machinery and equipment). This in turn increases the percentage of the company's total income apportioned to Ohio for purposes of Ohio's taxes.

The second effect on an interstate business is the mirror image of the first. If an interstate business elects to locate new manufacturing machinery and equipment *outside* Ohio, the percentage of its net income subject to Ohio taxation will typically decrease. That is, the percentage of the company's property and (most likely) payroll outside the State will increase, meaning that a smaller percentage of the company's net income will be apportioned to Ohio. The result: the company's overall exposure to Ohio's corporate franchise tax will decrease, just as locating in Ohio increased its exposure.

In short, any new investment, either inside or outside the State, will have tax consequences in Ohio, just as it will have tax consequences in any other State that uses this apportionment formula.

2. Ohio's ITC is a one-time credit designed to spur new investment in the State. The credit is triggered by a corporation's investment in "new manufacturing machinery and equipment" that the corporation installs in Ohio, which under Ohio's apportionment scheme would presumably subject the corporation to increased Ohio taxes for many years. O.R.C. § 5733.05(B)(2)(a).

The credit the taxpayer receives is set at a percentage of the qualifying investment the taxpayer makes during a given year. The usual percentage is 7.5 percent. O.R.C. § 5733.33(C)(1). So, for example, if a business made a $1 million qualifying investment in Ohio, it would receive a tax credit of $75,000 against the corporate franchise tax it owes the State.

To limit the credit to truly *new* investment, the ITC applies only to the amount by which the investment in a given year exceeds the average investment by that same taxpayer in that same county during earlier baseline years. O.R.C. § 5733.33(C)(1), (A)(5), and (A)(15). So, for example, if a taxpayer had been investing $3 million per year in its plants in a given county during the baseline years, and then made a $5 million investment, the tax credit would be based only on the $2 million amount by which the new investment exceeded the baseline. In other words, a taxpayer who has previously invested in the same county receives a lesser credit for the same investment than one who has never invested in the county.

If the investment is made in an "eligible area," the percentage increases to 13.5 percent. O.R.C. § 5733.33(C)(2). Eligible areas are those that the Ohio Department of Development determines, based on statutory

criteria, to be a "distressed area," a "labor surplus area," or a "situational distress area." O.R.C. § 5733.33(A)(9). Each of these designations turns on factors such as the rate of unemployment and the percentage of the population living below the poverty line in a certain geographic area. See O.R.C. § 5733.33(A)(8), (10), (11), and (13). Thus, the State's interest in increasing investment in these targeted areas goes beyond simply increasing its own revenues and includes its interests in urban renewal and safeguarding the health and welfare of its residents.

The ITC statutes require the taxpayer to spread its one-time credit over a multi-year period. In particular, one-seventh of the amount of the credit attributable to an investment made in "year one" is available in each of the seven years after the investment. O.R.C. § 5733.33(C)(4). The credit is nonrefundable, meaning that it can be used only to offset the corporation's tax liability (i.e., it cannot be used to generate a refund). Any unused portion of the credit in a given year can, however, be carried forward up to three years. O.R.C. § 5733.33(D). Thus, the credit for a particular investment may be taken over a period ranging from seven to ten years (i.e., seven years with a three-year carryforward).

In this case, DaimlerChrysler invested in an "eligible area" in Toledo, Ohio. Accordingly, it received a credit of 13.5 percent of its new investment in the eligible area, a credit it may claim on its corporate tax returns over a seven- to ten-year period.

C. The Respondents are state taxpayers and former property owners.

The Respondents are individuals who reside and pay taxes in Ohio, individuals who reside and pay taxes in Michigan, and three Ohio corporations who pay taxes in Ohio. Three individuals and one business allege that they formerly resided or operated within the boundaries of what

became the Jeep plant expansion, and their property was taken for that purpose. Most Respondents base their standing solely on their status as taxpayers.

More specifically, Respondents Cuno, Branwen, Pfaff, Brundage, Herbert H. Raschke, Carol A. Raschke, Arquette, Ebright, Czapczynski, Coyle, Kaczmarek, and Landingham all claim to be residents of Toledo and property owners or renters who pay property, sales and/or income taxes to the City of Toledo and the State of Ohio. In addition, Ebright, Czapczynski, and Kaczmarek assert that they formerly resided within the boundaries of the Jeep Plant expansion and that they were displaced as result of the use or threatened use of the power of eminent domain by the City of Toledo. Respondents Kathleen Hawkins, Carrie Hawkins, and Slaughter allege that they are residents of Michigan and that they pay taxes to the State of Michigan. J.A. 18a (Compl. ¶¶ 2, 3; Second Amended Compl. ¶ 3a).

Three Respondents are businesses. One, Phoenix Earth Food Co-op, Inc., is an Ohio not-for-profit corporation. The second, Hutton Pharmacy, Inc., is a for-profit corporate taxpayer. Finally, Kim's Auto and Truck Services, Inc. ("Kim's Auto" or "Kim's") is an Ohio for-profit corporation that was located within the boundaries of the Jeep Plant project. When the complaint was filed, Kim's was still fighting expropriation in state-court eminent domain proceedings. Kim's surrendered possession on August 18, 2004.

With the exception of Kim's, all Respondents seem to base their standing on some type of state taxpayer theory or other claim of generalized harm. The Ohio Respondents ("Ohio Taxpayers") allege that they are injured by the ITC because it "depletes the funds of the State of Ohio to which the Plaintiffs contribute through their tax payments, thereby diminishing the total funds available for lawful uses and imposing disproportionate burdens on the Ohio Plaintiffs."

J.A. 28a (Compl. ¶ 40). The Michigan Respondents ("Michigan Residents") allege that the alternative site for the plant was in Michigan, and that they have been injured by the loss of "economic opportunities, in the forms of jobs and/or certain tax revenues to the benefit of certain local governments and the State of Michigan, from which the Michigan Plaintiffs would have benefited." J.A. 29a (Compl. ¶ 42). Finally, Kim's alleged that "[w]ithout the aforesaid investment tax credit, the Stickney Avenue Jeep plant would not have been expanded, causing Kim's Auto to be slated for displacement" and that the plant expansion and its forced relocation would injure Kim's business in ways ranging from disruption of its business to loss of its customers. J.A. 28a–29a (Compl. ¶ 41).

D. The proceedings below.

Respondents originally filed their action in state court. Because the claims included a claim arising under federal law (i.e., § 1983 and the negative Commerce Clause), DaimlerChrysler, with the Ohio Petitioners' consent, removed the case to the district court for the Northern District of Ohio.

Respondents moved to remand, asserting concerns about the federal court's jurisdiction over the case, including standing.[4] In their motion to remand, Respondents stated that "[t]he hurdle for Article III standing in this case is significant" and acknowledged "that there are substantial doubts about their [own] ability to satisfy either the

[4] Respondents also raised the Tax Injunction Act ("TIA"), *Pullman* abstention, and the Eleventh Amendment, issues that are no longer relevant. First, this Court has now clarified that the TIA does not bar an action challenging a tax credit, and that the State waives its Eleventh Amendment immunity by consenting to removal. See *Hibbs v. Winn*, 542 U.S. 88 (2004); *Lapides v. Bd. of Regents of Univ. Sys.*, 535 U.S. 613 (2002). Second, the abstention argument concerned Count 3 of the complaint, a claim that has been abandoned.

constitutional or the prudential limitations on standing in federal court." Supp. Mot. to Remand at 11, 13, available at Court of Appeals J.A. 136, 138.

In opposing the remand, Petitioners argued that Kim's, and only Kim's, alleged facts that, if taken as true, were sufficient, at least for purposes of the court's initial review, to arguably establish standing to challenge the investment tax credit. The district court proceeded to hear the case, including the Commerce Clause claim, on the basis that "[a]t the bare minimum, the Plaintiffs who are taxpayers have standing to object to the property tax exemption and franchise tax credits under the 'municipal taxpayer standing' rule articulated in [*Frothingham*] *v. Mellon*," 262 U.S. 447 (1923)."[5] J.A. 78a. The court failed to explain why municipal taxpayer standing would apply to the ITC, a state tax credit.

Petitioners then moved to dismiss the case for failure to state a claim, and the district court granted those motions. As to the ITC, the district court concluded that States may structure "their tax systems to encourage the growth and development of interstate commerce and industry," and that competition among the States "lies at the heart of a free trade policy." Pet. App. 27a (quoting *Boston Stock Exch.*, 429 U.S. at 336). The court recognized that Ohio could not adopt either a "protective tariff or customs duty" or a tax credit that turns on the level of activity *outside* the State, but it correctly found that the ITC did not fall in either of these forbidden categories. Pet. App. 28a–29a (quoting *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994) and citing *Westinghouse Elec. Co. v. Tully*, 466 U.S. 388 (1984)). Accordingly, it found that Respondents' facial challenge to the ITC failed as a matter of law. The district court also dismissed Respondents' challenge to the property tax exemption. Pet. App. 29a.

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[5] Petitioners dispute that Respondents would have any greater standing to assert their claims in Ohio state courts.

Respondents appealed the dismissal to the Sixth Circuit, which affirmed in part and reversed in part. The appeals court affirmed the lower court as to the property tax exemption, finding that because "the conditions for obtaining the favorable tax treatment are related to the use or location of the property itself" and "do not discriminate based on an independent form of commerce," they are permissible. Pet. App. 11a, 12a.

As to the ITC, however, the appellate court reversed the district court's judgment and, instead of merely reversing the dismissal, it actually entered judgment on Respondents' behalf. The court acknowledged that "the investment tax credit at issue here is equally available to in-state and out-of-state businesses." Pet. App. 6a. Nonetheless, it concluded that the tax credit discriminated against interstate commerce. In particular, it accepted Respondents' argument that "the economic effect of the Ohio investment tax credit is to encourage further investment in-state at the expense of development in other states and that the result is to hinder free trade among the states." Pet. App. 9a.

Petitioners sought rehearing en banc. In these petitions, Ohio argued that the panel erred on the law, and also raised concerns about standing as a result of certain changes in the facts relating to Kim's. In particular, after receiving the lower court's decision issued September 2, 2004, Petitioners discovered that on August 18, 2004, i.e., before the decision was entered, Toledo took possession of Kim's property pursuant to a final judgment in state court eminent domain proceedings. Shortly thereafter, Kim's building was demolished. Petitioners argued that these changes deprived Kim's of any standing it may have had, and renewed their argument from the district court that no other Respondent had standing. The Sixth Circuit denied the petitions.

All parties then petitioned this Court for certiorari. Plaintiffs, now Respondents here, petitioned (in No. 04-

1407) regarding the property tax exemption. That petition remains pending. Both the Ohio Petitioners and DaimlerChrysler filed petitions challenging the holding as to the ITC. The Court accepted the petitions challenging the ITC determination, and also ordered the parties to address the issue of Respondents' standing to bring this claim.

SUMMARY OF ARGUMENT

The court below committed two key errors. First, it never should have reached the merits of Respondents' negative Commerce Clause attack on Ohio's ITC, as the Respondents lacked standing. Second, the court adopted a flawed analytical framework that inappropriately extends the negative Commerce Clause's reach far beyond the anti-protectionist moorings that define its proper bounds.

1. Ohio and its sister States would, in many ways, prefer a ruling on the merits to clarify our ability to use tax incentives to promote economic growth. And, indeed, Ohio acknowledges that we once believed that one Respondent arguably did have standing, so after the initial wrangling in the district court, we focused on the merits in the court of appeals. But now, in assessing the question anew at this Court's direction, Petitioners have concluded that Respondents all lack standing to challenge Ohio's ITC.

The Ohio Taxpayers here never had standing to press these claims. The Court has long prohibited generalized taxpayer standing, yet that is what the Ohio Taxpayers assert. Their generalized interest in the Ohio treasury does not create standing.

Further, the Ohio Taxpayers, aside from running into the Court's barriers against taxpayer standing, also fail to clear the prudential limits on standing that the Court has long followed. The Ohio Taxpayers fall far outside the zone of interests protected by the negative Commerce Clause, as the Clause protects the right to engage freely in interstate trade,

and the Ohio Taxpayers do not allege that they face trade barriers due to the ITC.

The Michigan Residents likewise have no standing here. As Michigan taxpayers, they are even more removed from standing than the Ohio Taxpayers, as they do not even pay into the Ohio fisc. Nor can they achieve standing as Michigan residents claiming loss of economic opportunities because the DaimlerChrysler plant is not in Michigan. This theory fails to satisfy Article III, as there is no causal link between the ITC and the lack of a Michigan plant. The Michigan Residents cannot show that the plant would have been built in Michigan. And in any event, their complaint is surely not redressable now, as Chrysler will not abandon its Ohio plant and move to Michigan. Further, the Michigan Residents are also outside the zone of interests, thus failing the prudential standing test, as they are not harmed in their participation in an interstate marketplace.

Finally, Kim's Auto lacks standing as well. Kim's once ran its business on land that is now part of the Jeep plant campus, and when it sued, Kim's was still trying to stave off the loss of its land. Even then, it never had standing, because the ITC did not necessarily cause the then-threatened taking, and even if it did, the taking did not cause the speculative business losses that Kim's says flowed consequentially from the taking. Further, Kim's alleged injury is not redressable now. It will not get its land back, and it is too late to prevent the disruptions and losses engendered by the relocation. And Kim's, too, is outside of the zone of interests protected by the negative Commerce Clause, for, although it claims business losses, those alleged losses were not related to any marketplace distortion allegedly caused by the ITC.

Thus, no Respondent had—or has now—standing to challenge this state tax law in federal court.

2. The lower court's decision on the merits was also flawed. The key principle animating the Court's negative Commerce Clause jurisprudence is the prohibition on "economic protectionism—that is, regulatory measures designed to benefit instate economic interests by burdening out-of-state competitors." *Fulton*, 516 U.S. at 330 (1996). But the ITC is not protectionist legislation.

The negative Commerce Clause is a judicially-created counterpart to the Commerce Clause that is designed to ensure the free flow of interstate commerce. A State's police power includes the authority to regulate commerce within its borders, but the State violates the Constitution, in particular the negative Commerce Clause, if the State exercises that power to discriminate against interstate commerce.

Of course, one of the States' core sovereign prerogatives is the right to tax commerce. See *Dep't of Revenue v. ACF Indus.*, 510 U.S. 332, 345 (1994) (a State's "taxation authority" is "central to state sovereignty"). But, because taxation impacts commerce, negative Commerce Clause constraints have implications for state tax law. In particular, in *Complete Auto Transit, Inc. v. Brady*, the Court adopted a four-prong test for determining whether a given state tax (and, presumably, state tax credit) offends the negative Commerce Clause. 430 U.S. 274, 279 (1977). Of particular import here, under *Complete Auto* States may not assess taxes that "discriminate against interstate commerce." *Id.*

In assessing "discrimination," however, the Court has carefully hewn to the anti-protectionist moorings that underlie the negative Commerce Clause. So, for example, the Court has struck state taxes that act as tariffs, or that seek to penalize domestic businesses for engaging in out-of-state business. But, the Court has also noted that where a State's laws are *not* protectionist, the negative Commerce Clause's anti-discrimination principle does not prevent the use of state

incentives "to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch.*, 429 U.S. at 336. Indeed the Court has referred to such encouragement as a "laudatory goal." *Trinova*, 498 U.S. at 385. So, for example, the Court has stated that subsidies to domestic businesses generally do not violate the anti-discrimination principle. And, while the Court as a whole has never opined on investment tax credits, more than one Justice has noted that such incentives are a legitimate mechanism for pursuing the "laudatory goal" of encouraging development. See, e.g., *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J., concurring) (The Commerce Clause does not "inhibit a State's power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce."); *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 351 (1992) (Rehnquist, C.J., dissenting) ("There seems to be nothing . . . that would prevent [a State] from providing subsidies or other tax breaks to domestic industries.").

Under these principles, the ITC here easily passes constitutional muster. Simply put, the Ohio ITC is not a protectionist measure "designed to benefit in-state economic interests by burdening out-of-state competitors," but is rather a constitutionally-benign measure designed to improve Ohio's economic climate. It does not provide domestic businesses with any competitive advantage nor provide any impediment to the flow of goods and services across Ohio's borders, as a tariff would. Nor does the credit penalize businesses based on the percentage of operations the businesses conduct out-of-state. Indeed, the amount or percentage of operations conducted outside Ohio is entirely irrelevant for purposes of the ITC.

The only question the ITC asks is whether the business—be it a business having an established presence in

Ohio, or one coming here for the first time—has made a qualifying new investment in the State. And, because of the way the credit defines "qualifying investment," the ITC may actually *create* incentives for businesses to spread their operations across States, at least if other States use ITCs like Ohio's. In short, the credit offers "no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply." *General Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997).

ARGUMENT

I. The Court Below Should Never Have Reached The Merits Of The Negative Commerce Clause Claim, As The Respondents Lacked Standing To Challenge The ITC.

A. Respondents must satisfy both Article III and prudential standing requirements.

The Court's standing jurisprudence includes two prongs: "Article III standing, which enforces the Constitution's case or controversy requirement, and prudential standing, which embodies judicially self-imposed limits on the exercise of federal jurisdiction." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (citations and quotation marks omitted). As *Newdow* summarized, "The Article III limitations are familiar: The plaintiff must show that the conduct of which he complains has caused him to suffer an injury in fact that a favorable judgment will redress." *Id.* at 12 (same). "[P]rudential standing encompasses the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Id.* (same).

While both the Article III and prudential standing requirements apply in all cases, the Court has an especially developed doctrine in the field of "taxpayer standing," as would-be plaintiffs often seek to rely on their status as taxpayers to challenge government action. In the federal taxpayer context, the Court has long held that federal taxpayers do not have standing to challenge expenditures based on the simple theory of increased tax burden. See *Valley Forge Christian Coll. v. Americans United for the Separation of Church and State, Inc.*, 454 U.S. 464, 482 (1982); *Frothingham*, 262 U.S. at 488; *Alabama Power Co. v. Ickes*, 302 U.S. 464, 478 (1938). Apart from an exception allowing taxpayers to challenge an exercise of Congress's spending power as exceeding specific constitutional limitations (i.e., certain establishment clause challenges), see *Flast v. Cohen*, 392 U.S. 83, 102–03 (1968), the Court has held fast to its rule barring federal taxpayer standing to challenge expenditures. See also *Simon v. E. Ky. Welfare Rights Organization*, 426 U.S. 26 (1976), *United States v. Richardson*, 418 U.S. 166 (1974), *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974). Further, while earlier taxpayer-standing cases did not solidly confirm whether taxpayer-standing limits fell taxonomically under Article III or prudential-standing doctrine, the Court has since made clear that Article III is the root of such limits. *Valley Forge*, 454 U.S. at 475–78 (no case or controversy); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 574 (1992) (noting that *Frothingham* had "dismissed for lack of Article III standing.").

In addition, the Court has often emphasized that limits on standing reflect the limits of the role of the judiciary in our system, as the judiciary would step outside its proper role if it were to review decisions by the political branches in the absence of a true controversy involving parties concretely affected. See *Valley Forge*, 454 U.S. at 474; *Richardson*, 418 U.S. at 188 (Powell, J., concurring); *Frothingham*, 262 U.S.

at 488–89 ("To [accept taxpayer standing] would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess."). And as several circuit courts have noted, that concern about the judicial role takes on heightened importance when *state* taxpayers sue in *federal* court, as that raises federalism concerns on top of the normal separation-of-powers concerns. See, e.g., *Taub v. Kentucky*, 842 F.2d 912, 919 (6th Cir. 1988) ("Considerations of federalism should signal the same caution in [state taxpayer actions] as concern for preservation of the proper separation of powers in an 'all federal' action."); *Colo. Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1402 (10th Cir. 1992) ("Requiring a distinct and palpable injury for state taxpayers comports with notions of federalism that are central to our system of government.").[6]

Indeed, the Court has repeatedly held that state taxpayers, like federal taxpayers, lack standing to pursue generalized grievances against government action. See *Doremus v. Bd. of Education*, 342 U.S. 429, 434 (1952) (quoting *Frothingham* and denying state taxpayer standing to challenge a statute requiring the reading of Bible verses in public schools); *Williams v. Riley*, 280 U.S. 78, 80 (1929) (applying *Frothingham* and denying standing to state tax payers challenging California's motor vehicle fuel tax). See also *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613–14 (1989) (Kennedy, J., concurring) ("We have likened state taxpayers

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[6] The federalism aspect of the state-taxpayer standing doctrine mirrors the policy embodied in the Tax Injunction Act, which prohibits federal courts from enjoining the collection of state taxes. 28 U.S.C. § 1341. Here, Respondents (opposing removal to federal court) initially raised the Tax Injunction Act as well, but the district court found that it does not apply because Respondents seek to invalidate tax *credits*, and any such invalidation would increase, not decrease, state revenue. While the district court was correct as a matter of formal Tax Injunction Act interpretation, similar federalism concerns do counsel against finding state taxpayer standing to challenge state tax laws in federal court.

to federal taxpayers, and thus we have refused to confer standing upon a state taxpayer absent a showing of direct injury, pecuniary or otherwise.").[7]

Measured against these principles, none of the Respondents have standing.

B. The Ohio Taxpayers do not have standing.

In challenging Ohio's investment tax credit, see J.A. 27a–30a (Count 4, Compl. ¶¶ 36–45), the Ohio Taxpayers (except for Kim's Auto, discussed below in Section I.D) allege just one injury: that the investment tax credit "depletes the funds of the State of Ohio to which the Plaintiffs contribute through their tax payments, thereby diminishing the total funds available for lawful uses and imposing disproportionate burdens on the Ohio Plaintiffs." J.A. 28a (Compl. ¶ 40). This allegation is nothing more than a generalized plea for state taxpayer standing. By their own words, Respondents correctly acknowledge that the investment tax credit works against "the *Ohio* corporation franchise tax," J.A. 27a (Compl. ¶ 37), and "depletes the funds of the *State of Ohio*," J.A. 28a (Compl. ¶ 40). Moreover, the Ohio Taxpayers do not even attempt to distinguish their own injuries from those of all Ohio taxpayers. This alone is sufficient to dismiss the Ohio Taxpayers for lack of standing, for, as explained above, the Court has never recognized *state* taxpayer standing.

Respondents argued below that certain parts of Ohio's *property tax exemption* operated like a municipal tax

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[7] By contrast, this Court has allowed standing for some *municipal* taxpayers. "The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the [municipal] corporation, which is not without some resemblance to that subsisting between stockholder and private corporation." *Frothingham*, 262 U.S. at 487.

scenario, even though the exemption is a state law; but that argument does not give them standing to challenge the *investment tax credit.* This case had previously included challenges to these two independent tax breaks, but now, only the ITC is at issue. (Respondents' independent certiorari petition on that claim remains pending, see *Cuno v. DaimlerChrysler, Inc.*, No. 04-1407). And even when both claims were at issue, any standing regarding the property tax issue (assuming arguendo that such standing was proper) did not allow the Ohio Taxpayers to bootstrap another claim for which they could not independently establish standing. That is because standing is measured count-by-count; "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996); *id.* at 357 ("The actual-injury requirement would hardly serve the purpose we have described above—of preventing courts from undertaking tasks assigned to the political branches—if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration.").

Indeed, when the district court decided that standing existed here, it did so only by finding that the *property tax exemption* justified a municipal-taxpayer approach, and the district court then extended its standing decision to the ITC challenge without ever explaining why. In rejecting an attempted remand to state court, the district court determined that "at least at this early stage in the litigation," Respondents could proceed under municipal taxpayer standing because they "allege that the *property tax exemption* reduces the funds available for the operation of the Toledo and Washington Local Schools." J.A. 78a (emphasis added). This, the district court found, was enough to decide the issue before it: whether the Respondents belonged in federal court *at all*, or whether they should remain in state court. Thus, while the district court did assert that Respondents "have standing to object to the property tax exemption and the

franchise tax credit statutes [i.e., the ITC] under the "'municipal standing' rule," J.A. 78a, it never explained the leap to including the ITC challenge. And because this issue was not addressed on appeal, no court has yet independently examined, let alone ruled in favor of, Respondents' standing to challenge the ITC.[8]

Moreover, not only do the Ohio Taxpayers fail to overcome the specific limits of taxpayer-standing doctrine, but they also fail to meet the general prudential standing requirements, as they are not in the "zone of interests" protected by the negative Commerce Clause. See, e.g., *Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 523–24 (1991). The negative Commerce Clause is meant to protect market participants against barriers to interstate trade. If those barriers take the form of discriminatory taxes, then the zone of interests includes those who pay the discriminatory tax. But a party's status as a payer of *other* taxes to the same government does not trigger negative Commerce Clause concerns: "The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such." *General Motors*, 519 U.S. 278, 300 (1997).

The Court's negative Commerce Clause cases reflect this, as those cases have all been brought by those who bore the economic effect of discriminatory regulation in some direct way. In *General Motors*, plaintiff GM paid the tax at issue, as a customer of a natural gas marketer, so it had standing. *Id.* at 286–87. Other cases also have been brought by those who directly paid discriminatory taxes. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 568–69 (1997). Still other cases have been brought by those who could not sell their wares across state lines

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[8] No party raised standing before the Sixth Circuit in the initial briefing. Ohio did raise standing in its petition for rehearing en banc. Because the appeals court denied rehearing, that court never opined on standing.

because barriers thwarted their efforts. See, e.g., *Granholm v. Heald*, 125 S.Ct 1885 (2005) (out-of-state winery challenged rules against interstate wine shipping); *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977) (agency representing Washington apple growers challenged North Carolina shipping regulations).

But the Court has never found general citizen standing, or general state taxpayer standing, to be enough for a negative Commerce Clause challenge. The closest the Court has come, perhaps, is *Maryland v. Louisiana*, 451 U.S. 725 (1981). In *Maryland*, the Court exercised original jurisdiction to hear several States' challenge to a Louisiana tax on natural gas brought into Louisiana. The Court found that standing existed because the States themselves were purchasers of natural gas, and they faced the cost of the tax when it was passed on to customers. *Id.* at 736. The Court also found that the States had standing to sue as *parens patriae* to represent the interests of many citizens. *Id.* at 737. But, notably, the Court explained that those citizens had a direct interest because they, too, were customers who bore the economic brunt of the tax—it was their status as customers, not as taxpayer-citizens generally, that triggered standing. *Id.* at 739.

In sum, the Ohio Taxpayers do not have standing *as taxpayers*.[9]

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[9] Respondents' Complaint also notes that three Ohio Taxpayers were homeowners whose land was taken for the plant expansion. J.A. 18a (Compl. ¶ 2). However, beyond that initial identification, the Complaint never again identifies them as having any specific injury beyond their status as taxpayers. To the extent that their identification as former property owners implies that the loss of property might be an independent injury, such a standing theory also fails. As detailed below (in Section I.D) regarding Kim's Auto, property-owning status does not confer standing here.

C. The Michigan Residents do not have standing.

The Michigan Residents also allege just one injury: that "[i]f the plant or plants had instead been located in Michigan, they would have provided economic opportunities, in the form of jobs and/or certain tax revenues to the benefit of certain local governments and the State of Michigan, from which the Michigan Plaintiffs would have benefited." J.A. 29a (Compl. ¶ 42). This, too, fails to establish standing.

First, to the extent that this alleged injury is based on the Michiganders' status as Michigan state taxpayers, their claim of standing fails for the same reason as the Ohio Taxpayers' claim—i.e., that state taxpayer standing does not exist—and then some. Even if state taxpayers could object to any or all policies of the State to which they pay taxes, that would not allow such state taxpayers to challenge *other States'* policies. And indeed, rather than challenging the expenditure of the tax revenue to which *they* contributed, the Michigan Residents wish to challenge an "expenditure" (i.e., a tax break as a form of spending) of *Ohioans'* tax dollars.

Second, to the extent that this alleged injury is based on non-tax-based economic losses, such as lost job opportunities in Michigan itself, that theory suffers a fatal lack of causation, so they fail to show Article III standing. No sufficient causal link exists between Ohio's ITC and hypothetical lost job opportunities in Michigan. Accordingly, these Michigan Residents do not allege an injury that is "fairly traceable to the challenged action of the defendant," *Lujan*, 504 U.S. at 560 (quoting *Simon*, 426 U.S. at 41–42) (brackets and ellipses omitted). To construct such a link, the Michigan Residents first must assert that but for the ITC, DaimlerChrysler would not have expanded in the Toledo location where it already operated. Next, and even more improbably, they must assert that a new plant, or an expansion, would have been in Michigan and nowhere else. While they do contend "upon information and belief" that

DaimlerChrysler was considering "an alternative site" in Michigan, J.A. 29a (Compl. ¶ 42), nothing in the complaint suggests that DaimlerChrysler did not consider location options all over the world. Finally, nothing in the complaint asserts, nor could it assert, that the three Michigan Residents, whose employment status is unmentioned, would have themselves gained employment through one of the unnumbered new jobs this hypothetical Michigan plant would have created.

Further, even if the Court were to accept this attenuated theory of causation and injury in fact, this alleged injury also fails to create standing in that it is not redressable by the relief requested in the complaint. Specifically, the Respondents have not alleged, nor could they, that any injunctive relief at this point would result in DaimlerChrysler's relocating the plant to Michigan. Progress on the plant expansion was already underway when this case began and has continued since. Thus, an injunction invalidating the agreement providing the tax exemptions, see J.A. 30a (Compl. ¶ 45), would not at this late stage lead DaimlerChrysler to write off the expenses it has incurred in constructing the plant and to start over in Michigan. And *a fortiori*, relief "against the operation of" the ITC statute as a whole, *id.*, would do nothing for the Michigan Residents now.

Lastly, even if the Michigan Residents could establish Article III standing, they fail to meet prudential standing requirements for the same reasons that the Ohio Taxpayers failed to do so. The Michigan Residents are equally outside the zone of interests protected by the negative Commerce Clause, as they, too, do not participate in any market that is purportedly skewed by Ohio's ITC program.

D. Kim's Auto does not have standing.

Ohio told the district court that only one Respondent, Kim's Auto, "arguably ha[s] standing" to challenge the ITC. Opp. to Remand at 7, available at Court of Appeals J.A. 158. But on closer review, even Kim's came up short.

Kim's Auto is a small towing-service and car-repair operation, and when the case began, it was located on property that DaimlerChrysler sought for expansion, so Kim's faced eminent domain proceedings. The eminent domain proceedings began in state court on May 22, 2000, while the original state-court complaint was filed on March 28, 2000. In the Complaint, Kim's alleged its injury as follows:

> Without the aforesaid investment tax credit, the Stickney Avenue Jeep plant would not have been expanded, causing Kim's Auto to be slated for displacement. Kim's will be injured by the displacement in that the business has in the past and will into the future experience temporary shutdowns, lack of customer access from public thoroughfares, loss of current location as a factor in customer decisions, temporary and/or permanent loss of business visibility, loss of income from temporary closure due to being moved, and possible permanent loss of business customers, all as a consequence of displacement.

J.A. 28a–29a (Compl. ¶ 41).

Notably, this claim of consequential damages lists those losses *caused* by the displacement and relocation of the business, but the language seems to omit naming the property taking itself as an injury. This seeming exclusion may have been because Kim's Auto's separate eminent-domain litigation aimed to (1) achieve "just compensation" for such a taking, and/or (2) to completely block such a taking, on a

theory that the Jeep plant expansion was not a legitimate public use. See *Kelo v. City of New London*, 125 S. Ct. 2655 (2005). Regardless of whether Kim's Auto's alleged injury is treated as just the consequential damages, or is read to include the taking itself, such an injury does not give Kim's standing.

1. Kim's Auto has no Article III standing.

Kim's has no Article III standing, even assuming that the consequential damages are an "injury in fact," because Kim's cannot show causation or redressability.

First, Kim's chain of causation breaks at the first link, for it cannot show that the ITC caused the Jeep expansion. Indeed, the core of Respondents' attack on tax-break policies across the land is their insistence that such tax breaks never work. See Cuno Resp. to Pet. for Cert. 5–6; Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377 (1996). That is not to say that Ohio, in questioning causation for standing purposes, is endorsing Respondents' pessimistic view of the ITC's effect. To the contrary, Ohio stands by its policymakers' judgment that such policies are, indeed, effective overall in spurring economic growth. But that general belief in the policy is not the same as the concrete causation needed in a particular case to justify standing.

Indeed, in this regard this case greatly resembles *Simon v. E. Ky. Welfare Rights Organization*, 426 U.S. 26 (1976). In *Simon*, indigent plaintiffs sought to challenge an IRS ruling granting tax-exempt status to hospitals that had denied those plaintiffs medical treatment. The plaintiffs claimed that the IRS ruling created a tax incentive that in turn led to their denial of treatment. But the Court said that such "causation" was far too speculative; the hospitals' decisions were not

necessarily tax-driven. Thus, plaintiffs had no standing. *Id.* at 42–43.

Here, too, the break in the chain is between the tax incentive and DaimlerChrysler's decision to expand its Toledo Jeep plant. Not only did Respondents fail to demonstrate that the ITC caused the decision, but the evidence they did offer creates doubt on that score. Respondents separately alleged that the property tax exemption caused the decision, J.A. 23a (Compl. ¶ 21), and the agreement between DaimlerChrysler and Toledo also included several other incentives from Toledo that are not at issue here. So the ITC was not "the" cause.

Second, even accepting that the ITC caused the expansion, and even accepting that the expansion caused the taking to be at that location (as opposed to the possibility that DaimlerChrysler could have built in another direction that did not impact Kim's), the taking did not cause the speculative business losses that Kim's alleges. Indeed, in typical takings litigation, it has long been settled that, under the "business losses rule," compensation for a taking does not extend to consequential losses beyond the value of the taken property, as such losses are inherently too speculative and too removed from the causal chain. See *Mitchell v. United States*, 267 U.S. 341, 345 (1925) ("The settled rules of law [ ] precluded [ ] considering . . . consequential damages for losses to [property owners'] business, or for its destruction. No recovery therefor can be had now as for a taking of the business.") (citations omitted); *Joslin Mfg. Co. v. Providence*, 262 U.S. 668, 675 (1922) ("[I]njury to a business carried upon lands taken for public use, it is generally held, does not constitute an element of just compensation."); *Preston v. Stover Leslie Flying Serv., Inc.*, 190 N.E.2d 446, at ¶ 5 of syllabus (Ohio 1963) ("Loss of future profits to be derived by a landowner whose property is taken in an appropriation proceeding is too speculative and uncertain for an accurate and satisfactory measurement of the

present value of the land taken."). Surely, if the causal chain breaks between a taking and such losses in a takings case, such a broken chain is not somehow repaired when a taking is *preceded* by other allegedly causal steps (i.e., the ITC → the expansion → the taking), when in the end the claim is still that the taking caused business losses.

Further, even if Kim's could forge stronger links across the entire causal chain, it cannot overcome a plain lack of redressability. Here, its claimed injury focuses not on the property taking itself, but on the alleged consequential damages, such as business lost in the transition. But that damages-style injury would not be redressed by the *relief* it seeks, which is limited to invalidating and enjoining the ITC. The prayer for relief does not seek damages, so this claim does not even truly seek to redress any lost business or other costs of displacement.

Thus, invalidating the ITC today would not reimburse Kim's Auto's losses, and indeed, invalidation today would not even turn back the clock on the loss of their location. Kim's Auto surrendered possession in August 2004, and soon after, their former building was demolished. DaimlerChrysler's expansion on the spot has proceeded, so today the land is part of the Jeep plant campus. In sum, nothing that Respondents seek will redress the injuries that Kim's alleges.[10]

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[10] Alternatively, if Kim's Auto's injury is the property-taking itself, and not just the "consequential damages," then that injury, too, fails to establish standing. First, the taking, unlike the consequential injuries, is not even an injury in fact, as only an *uncompensated* taking is an injury. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194–95 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. . . . [I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."). Here, Kim's received just compensation for the taking in state-court

2. Kim's Auto does not meet prudential standing requirements.

Even if Kim's Auto could somehow establish Article III standing, it cannot overcome the prudential limits on standing that the Court has developed. Of the three prudential standing factors, see above at 18, Kim's Auto fails to meet the third: the "zone of interests" test. This test asks "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

Here, Kim's Auto's claimed injury is a complete mismatch with the interest protected by the negative Commerce Clause. The negative Commerce Clause guarantees a right to engage in interstate trade free from discriminatory state regulation. *Dennis v. Higgins*, 498 U.S. 439, 448–50 (1991). Yet Kim's Auto asserts property rights. Even if it focuses on consequential damages resulting from the taking, Kim's claim is still rooted in an underlying right to keep its property and to bar a taking that, allegedly, was triggered by the State's improper barriers to trade. So, although Kim's asserts a right to avoid the consequential damages that purportedly flowed from that taking, as opposed to the taking itself, its core right here involves property, not free trade.

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eminent domain proceedings. So the taking itself cannot serve double-duty as an "injury in fact" here to justify this negative Commerce Clause challenge.

The taking-as-injury also suffers a lack of causation and redressability. It suffers the same lack of causation as the consequential-damages injuries—namely, that the ITC did not necessarily cause the taking. And even more certainly, this injury is not redressable by this suit, as the taking itself will not be reversed, and such reversal has not even been sought.

Indeed, nowhere does Kim's Auto even allege, let alone demonstrate, that it is being blocked from participating in interstate trade, so its allegations of property-based injury do not place Kim's within the zone of interests protected by the negative Commerce Clause. As explained above, in detailing the Ohio Taxpayers' lack of prudential standing, the Court has allowed negative Commerce Clause challenges only where a plaintiff has a concrete economic interest at stake: either a plaintiff pays a discriminatory tax itself or through an intermediary, or it is hamstrung in selling its wares across state lines, and so on. But Kim's does not allege anything similar. It has not been denied an investment tax credit; it has never requested one. The ITC does not impose any regulatory burden upon Kim's as a business; it is not harmed in its competition with other auto-repair or towing businesses as a result of the ITC's existence.

By contrast, it is easy to imagine the types of plaintiffs who could challenge Ohio's ITC. DaimlerChrysler's competitors who build cars in other States could challenge it, on the idea that DaimlerChrysler can translate its tax break into lower prices for its cars, thus having an "unfair" advantage over the other car manufacturers. Or, because Ohio has granted the ITC to many companies, any competitor of such a company could also have standing. Or perhaps an Ohio-based company that builds a new plant *outside Ohio* could attempt to claim the credit nonetheless, and charge that it should not suffer the denial-of-credit merely because it built somewhere other than Ohio. In short, others may challenge this law, but not Kim's Auto.[11]

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[11] The availability of other plaintiffs to challenge tax credits is not hypothetical. Northwest Airlines and several other airlines currently are challenging a Wisconsin law that offers property tax credits to airlines that locate "hub facilities" in Wisconsin. The theory of the case tracks Respondents' argument here. This case is currently pending before the Wisconsin Supreme Court. See *Northwest Airlines, Inc. v. Wis. Dep't of Revenue*, 281 Wis. 2d 117 (Wis. 2005) (granting review).

Thus, Kim's Auto could not, even at the beginning of this case, overcome the prudential limits on standing.[12]

II. The ITC Does Not Violate The Negative Commerce Clause.

A. The negative Commerce Clause forbids economic protectionism, but does not prevent States from using non-discriminatory means to encourage in-state growth.

As the Court has said more than once, the focus of the negative Commerce Clause doctrine is preventing "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Fulton*, 516 U.S. at 330. See also *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 647 (1994) (same); *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273–74 (1988) (same); *West Lynn Creamery*, 512 U.S. at 192 (same). The doctrine addresses the "central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Granholm*, 125 S. Ct. 1885 at 1895 (quotation marks omitted). Thus, "what is ultimate is the principle that one state in its dealing with another may not place itself in a position of economic isolation." *H.P. Hood &*

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[12] Finally, even if Kim's Auto once had standing, based on its status as a property owner *facing* a taking, it lost standing when it surrendered its property pursuant to the eminent domain judgment. As Ohio told the Sixth Circuit in seeking en banc review, that event occurred just weeks before the Sixth Circuit issued its decision, so the case was already moot at that point. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 (1997) ("Mootness has been described as the doctrine of standing set in a time frame.") (quotation marks omitted).

Sons, Inc. v. Du Mond, 336 U.S. 525, 538 (1949). See also *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 401 (1994) (O'Connor, J., concurring). In other words, the States are not "separable economic units;" rather, the one "economic unit is the Nation." *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98–99 (1994) (quoting *H.P. Hood & Sons*, 336 U.S. at 537). See also *Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992) (Scalia, J., dissenting) ("Our negative Commerce Clause jurisprudence grew out of the notion that the Constitution implicitly established a national free market.").

As this focus on preventing economic Balkanization and promoting a unitary national market suggests, the negative Commerce Clause is directed to those State laws that create barriers that interfere with the free flow of goods and services across state lines. "Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents," as "[r]estrictions so contrived are an unreasonable clog upon the mobility of commerce." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935).

State laws that create incentives for in-state economic growth without relying on such barriers, however, are entirely consistent with the Commerce Clause. As the Court has noted, States are free to adopt policies designed to "encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch.*, 429 U.S. at 336. And the Court has indicated, for example, that state subsidies to in-state companies "ordinarily impose[] no burden on interstate commerce, but merely assist[] local businesses." *West Lynn Creamery*, 512 U.S. at 199; *New Energy*, 486 U.S. at 278 ("Direct subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause] prohibition."). That only makes sense, as the

Commerce Clause itself is similarly designed to promote economic growth:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. Hood & Sons, 336 U.S. at 539.

As described below, Ohio's ITC—which provides incentives for growth in Ohio, but does not burden out-of-state activities—is perfectly consistent both with the "vision of the Founders" and with the "doctrine of this Court which has given it reality." *Id.* To be sure, the court below reached a different result, but only because, in direct contravention of the Court's teachings, it *rejected* the notion that "the Commerce Clause is primarily concerned with preventing economic protectionism." Pet. App. 9a.

B. The Court's Commerce Clause cases invalidate only those taxes that reflect economic protectionism, such as tariffs or taxes that penalize companies for out-of-state activities.

State tax laws inevitably impact commerce. Accordingly, these laws are subject to the negative Commerce Clause's prohibition on economic protectionism. Indeed, much of the Court's recent negative Commerce Clause jurisprudence concerns state tax laws. In keeping with the anti-protectionist underpinnings of the negative

Commerce Clause, this jurisprudence confirms that States cannot use their tax laws either to establish tariffs, or to penalize companies for their out-of-state activities. Nothing in the Clause, however, prevents Ohio from providing non-discriminatory tax incentives for intrastate development—and Ohio's ITC is an incentive, not a tariff or penalty.

1. The Court established the analytic framework for negative Commerce Clause challenges to state tax laws in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Under *Complete Auto*, a state tax provision satisfies the Commerce Clause as long as (1) a substantial nexus exists between the taxing State and the taxed activity, (2) the tax fairly apportions income, (3) the tax does not discriminate against interstate commerce, and (4) the tax is fairly related to the benefits the State provides. *Id.* at 279. Respondents conceded below that the ITC meets the first, second, and fourth prongs of this test, leaving the question of whether it "discriminates against interstate commerce" as the only open issue. See Pet. App. 4a (noting that there is no dispute that the ITC meets three of the four *Complete Auto* prongs).

Of course, in the context of state taxes, "discriminate" necessarily means more than merely being "geographically aware," i.e., treating out-of-state transactions differently from in-state transactions. It is not only constitutionally permissible in appropriate circumstances for state taxes to be geographically aware; it is often constitutionally required. Ohio would surely violate the Constitution, for example, if it sought to impose a sales tax on transactions that occur in California the same way it imposes sales tax on sales that occur in Ohio. Similarly, the whole notion of "apportionment" turns on appropriately assigning to particular geographic locations the various productive activities in which a corporate taxpayer engages.

Accordingly, the Court has understood and applied this anti-discrimination principle in light of the Commerce

Clause's anti-protectionist moorings. To that end, the Court asks whether the state tax law "discriminates against or unduly burdens interstate commerce and thereby 'impedes free private trade in the national marketplace.'" *General Motors*, 519 U.S. at 287 (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980)) (brackets omitted). That is, as with the Commerce Clause generally, the Court's focus is on preserving the free flow of commerce across state boundaries and on maintaining the existence of a single national market, in order to prevent the threat of "economic Balkanization" among the States.

2. Even in invalidating state tax laws, the Court has stressed that while States may not engage in protectionism, the Commerce Clause does not "prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch.*, 429 U.S. at 336. To the contrary, "a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry." *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 271 (1984). In fact, it is "a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State." *Trinova*, 498 U.S. at 385. And, to the extent that such incentives will result in competition among the States, the Court has noted that such competition "is a central element of our free trade policy." *Bacchus Imps.*, 468 U.S. at 272. See also *Boston Stock Exch.*, 429 U.S. at 336–37 ("Nor do we hold that a State may not compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy."). Thus, the basic framework is that non-discriminatory "incentives" pass muster, but "protectionism" does not.

3. Distinguishing between impermissible "economic protectionism" and permissible "incentives," as this Court has noted, requires a "sensitive, case-by-case analysis." See *West Lynn Creamery*, 512 U.S. at 201. In undertaking that

analysis, the Court has invalidated two basic categories of state tax laws: (1) taxes (particularly transactional taxes such as sales or use taxes or other excises) that act like tariffs, and (2) taxes that penalize in-state businesses for their out-of-state activities. See Philip M. Tatarowicz & Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879 (1986).

Much of the Court's jurisprudence in this area is devoted to transactional taxes such as sales taxes. See, e.g., *West Lynn Creamery*, 512 U.S. at 188 (tax on milk dealers based on sales of milk); *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 22–23 (1990) (excise tax on alcoholic products); *New Energy*, 486 U.S. at 271 (fuel tax credit), *Bacchus Imps.*, 468 U.S. at 265 (excise tax on liquors); *Maryland*, 451 U.S. at 728 (first use tax); *Boston Stock Exch.*, 429 U.S. at 319 (tax on sale of stock). With such taxes, of course, differential taxes for in-state and out-of-state products provide a direct competitive advantage to the in-state producer in every transaction. Thus, they are entirely equivalent to tariffs, the "paradigmatic example of a law discriminating against interstate commerce." *West Lynn Creamery*, 512 U.S. at 193. Similarly, the Court has had little difficulty in striking tax laws that are mere variations on that theme—for example, laws that tax "a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984).

In short, when a "case-by-case analysis" reveals that a tax is, in fact, a tariff, the Court strikes it down, and rightly so. All such laws provide a benefit to in-state commerce, and do so by burdening out-of-state commerce. It is this *combination* of benefit and burden that triggers the Commerce Clause violation. See *Or. Waste Sys.*, 511 U.S. at 99 (discrimination "means differential treatment of in-state and out-of-state economic interests that benefits the former

and burdens the latter") (emphasis added). The combination necessarily creates the "competitive disadvantage" that is anathema to the Commerce Clause. That is, if the tariff-like tax is imposed on goods moving into the State, it increases out-of-state producers' marginal costs as compared with their local competitors, impairing their ability to compete in the local market. Alternatively, if imposed on resources moving out-of-state, it impairs out-of-state producers who use the resources in competing with in-state producers who have access to the same resource, tariff-free. In either event, the tax creates barriers to a free flow of interstate commerce—barriers that the Commerce Clause is designed to prevent.

The Court's holdings in *Maryland* and *Boston Stock Exchange*, for example, focused on these very issues in striking the laws there. In *Maryland*, Louisiana imposed a per-cubic-foot transactional tax on the first use of natural gas traveling through the State. 451 U.S. at 731–32. Under the tax, however, "gas used for certain purposes within Louisiana is exempted from the Tax," uses such as "(1) producing oil, natural gas or sulphur; (2) processing natural gas for the extraction of liquefiable hydrocarbons; or (3) manufacturing fertilizer." *Id.* at 756. But, as the Court correctly noted, "[c]ompetitive users in other States are burdened with the Tax," *id.*, meaning of course that the tax resulted in an unfair competitive advantage for domestic producers of those products.

Similarly, in *Boston Stock Exchange*, New York imposed a tax on securities transactions. 429 U.S. at 319. The Court found the tax violated the Commerce Clause, but only because it was structured in a way that "impose[d] a greater liability on out-of-state sales than on in-state sales," *id.* at 333, again resulting in an unfair competitive advantage for local purveyors of securities exchange services. Thus, as in *Maryland*, the tax imposed a barrier to the free flow of interstate commerce.

The Court has likewise found impermissible economic protectionism where a State erects barriers by penalizing in-state businesses for engaging in out-of-state activities, such as where States tax similarly situated companies differently depending on the extent to which the companies engage in out-of-state activity. For example, in *Westinghouse Electric Company v. Tully*, 466 U.S. 388 (1984), the tax incentive awarded for in-state activities expressly depended upon the percentage of the taxpayers' sales that occurred outside the taxing State, effectively penalizing the taxpayer for engaging in out-of-state activity. The Court referred to this aspect of the tax as its "most pernicious effect" from a Commerce Clause standpoint. *Id.* at 400 n.9. Similarly, in *Camps Newfound*, the amount of a property tax exemption turned on whether the camps served in-state or out-of-state residents. 520 U.S. at 568. In each case, a State did not merely provide a benefit for in-state activities, but imposed an affirmative penalty associated with participation in interstate commerce.

Where neither a tariff effect nor a penalty is present, however, the Court has never suggested that merely providing a "benefit" to domestic companies violates the Commerce Clause. As noted above, for example, the Court has stated that subsidies to domestic industry typically comport with the Commerce Clause. And extending the Commerce Clause to the "benefit only" setting now would radically expand its scope, as there is no ready limiting principle. Virtually any improvement a State undertakes could be characterized as "benefiting" in-state companies. New roads may lower the company's transportation costs, upgrading water or sewer lines may increase plant capacity, and improving the State's primary and secondary education system may make it easier for the company to attract new employees. Similarly, enacting an across-the-board reduction in corporate tax rates, or eliminating such taxes altogether, would undoubtedly benefit Ohio's corporate taxpayers.

Certainly no one would suggest that such "benefits" raise Commerce Clause concerns.

Applying these principles here, the ITC is perfectly compatible with the Commerce Clause. As shown below, it neither acts as a tariff, nor penalizes companies for engaging in interstate activities.

C. The ITC promotes in-state growth in a legitimate way, and does not constitute economic protectionism.

The Commerce Clause prohibits protectionism, but does not prevent States from using their tax systems to provide incentives. Although the Court has never before had the opportunity to directly examine an ITC that applies to a corporate franchise tax, such a credit is a paradigmatic example of the latter. It is a one-time credit akin to a subsidy rather than a transactional tax. It is available to all companies—whether currently in the State or not—that locate new facilities in the State. Finally, it does not burden out-of-state investment.

1. The ITC does not function as a tariff. It provides a one-time credit based on new investment in Ohio, which the taxpayer can claim as a credit against corporate franchise taxes over a ten-year period. As a one-time payment, it provides in-state companies no competitive advantage over out-of-state competitors for transactions in the in-state market (or in any other market). See *Granholm*, 125 S.Ct. at 1895 ("States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses."). And it certainly does not provide any such benefit *by burdening out-of-state commerce*. That is, while it will undoubtedly make the company that receives it wealthier than it otherwise would have been (just as a direct subsidy would), the credit neither lowers the marginal costs of the in-state company that receives the credit, nor

increases the marginal costs of its out-of-state competitors. Accordingly, the credit will not serve to "divert market share" to local producers, *West Lynn Creamery*, 512 U.S. 203, nor will it allow Ohio to "build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States," *Guy v. Baltimore*, 100 U.S. 434, 443 (1984). Moreover, because it does not provide a competitive advantage to local producers, it will not foster the economic isolationism and Balkanization that are "the very evil that the dormant Commerce Clause was designed to prevent." *Camps Newfound*, 520 U.S. at 578. In short, the credit does not, and cannot, harm either Ohio's market, or out-of-state competitors in their efforts to compete for business in that market, the only harms that the negative Commerce Clause recognizes. See *General Motors*, 519 U.S. at 300 ("The dormant Commerce Clause protects markets and participant in markets, not taxpayers as such.").

2. Unlike the tax break at issue in *Westinghouse*, whose value turned on the percentage of the taxpayer's in-state activity, the tax credit here is freely available to all who make a qualifying investment in Ohio. Indeed, if anything, it is *more* available to first-time entrants into the State than to those with an existing presence.

The Court in *Westinghouse*, in striking down a state tax credit, "reiterate[d] that it is not the provision of [a] credit that offends the Commerce Clause, but the fact that it is allowed on an impermissible basis, i.e., the percentage of a specific segment of the corporation's business that is conducted in New York." 466 U.S. at 406 n.12. The credit here, by contrast is not "allowed on an impermissible basis." Rather, the ITC provides a tax credit to any company that makes a new investment in machinery and equipment in the State. All such companies may claim a credit of 7.5 percent of the cost of that machinery and equipment (13.5 percent if, as in this case, the machinery and equipment are installed in a designated distress area) against the franchise tax it would

otherwise owe. This credit is claimed over a seven-year period (one-seventh each year) with unused portions of the credit carried forward up to three years. Of course, all who make a capital investment in the State necessarily become subject to Ohio's franchise tax, so all taxpayers will be able to use some or all of the credit to offset tax liabilities. And, unlike the credit in *Westinghouse*, the credit here does not turn in any way on the percentage of the company's property, plant or equipment that is located in the State. In fact, that percentage is entirely irrelevant to the calculation of the tax credit.

Moreover, because of the way the ITC defines "new investment" (only "new investment" qualifies for the credit) companies who are entering Ohio for the first time more easily qualify to receive the credit. A given investment counts as "new" only to the extent that it exceeds the average investment the company made in that area during a certain baseline period. See O.R.C. § 5733.33(C)(1). For new entrants to the State, of course, that baseline value is zero. Thus, every dollar "counts." Existing corporate taxpayers, by contrast, may have large "baseline amounts" that would make qualifying for the tax credit substantially more difficult.

Nor does the potential impact of the credit on "pre-existing liabilities" change this analysis. The opinion below could be read as suggesting that the tax credit is not equally available to in-state and out-of-state companies in that it is worth more to those with "pre-existing [ ] tax liabilities." Pet. App. 13a. That is, new entrants may not have sufficient franchise tax bills to take full advantage of the credit, while those with pre-existing liabilities will be more likely to do so. That analysis, however, is fatally flawed in that the tax credit statute provides no reason on its face to believe that it is, on average, worth more to those with pre-existing tax liabilities. Whether a new entrant to the State (or a current taxpayer) is able to take full advantage of the tax break depends entirely

upon the size of the investment that is eligible for the credit, the amount of the corporation's income that is apportioned to the State as a result of the new (or increased) presence here, and the corporate franchise tax rate. It could well be the case that a given new entrant would be able to take its credit in its entirety, while an existing taxpayer may find that it has an insufficient tax bill to fully exhaust the credit it received for a new investment.

There is, at most, a hypothetical possibility that the tax credit *may* be worth more to those with pre-existing liabilities. But the Court has "never deemed the hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands." *General Motors*, 519 U.S. at 311 (quoting *Associated Indus.*, 511 U.S. at 654). "Discrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries." *Assoc. Indus.*, 511 U.S. at 654 (quoting *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 481 (1932)). In short, the mere possibility of such an effect is too slim a reed on which to support a federal court order trampling on the State's "indispensable power of taxation." *Northwestern States Portland Cement Co.*, 358 U.S. at 457.

3. Finally, while the ITC undoubtedly provides a benefit to all those who invest in the State, it does not burden Ohio taxpayers who choose to make their new investments out-of-state. That is, it does not seek to erect a barrier by penalizing Ohio taxpayers for their decision to move production facilities elsewhere. Indeed, under Ohio's apportionment formula, a new investment out-of-state would likely *lower* a company's Ohio tax bill. Presumably two of the three apportionment factors—the percentage of assets and payroll in the State—will decrease, decreasing in turn the percentage of the company's net income that is subject to Ohio's tax.

In short, the ITC does not trigger any Commerce Clause prohibition. It admittedly provides incentives for in-state development, but does so in a perfectly permissible manner. It provides no competitive advantage to in-state producers, does not burden out-of-state competitors, is freely available to all, and does not penalize those businesses already here for establishing new operations out of state.

D. The Commerce Clause does not impose Respondents' theory of tax neutrality, and, in any event, their theory is unworkable.

Respondents argued below for a tax-neutrality requirement, i.e., that the Commerce Clause requires state tax laws to leave a company indifferent, from a tax standpoint, on whether to invest in-state or out-of-state. That argument, however, fails for three reasons. First, the negative Commerce Clause does not, in fact, impose that requirement. Second, given the vast differences among state taxation systems, achieving that goal would require an unprecedented, and entirely inappropriate, level of judicial involvement in state tax system design. Third, if anything, the decision below striking the ITC may hinder, rather than advance, tax-neutral decision making.

1. The Commerce Clause does not include a strict tax-neutrality requirement. In fact, as noted above, the Court has said more than once that the Commerce Clause embraces competition among the States for interstate commerce. See *Boston Stock Exch.*, 429 U.S. at 336–37; *Bacchus Imps.*, 468 U.S. at 272. In doing so, the Court has never suggested that States cannot use their tax systems as part of that competition. To the contrary, in *Westinghouse*, the Court explicitly referred to "job-incentive credits and investment-tax credits" as permissible forms of state competition. 466 U.S. at 407 n.12. And, of course, any such credits could be characterized as violating Respondents' tax-neutrality requirement. To be sure, States cannot use their tax systems

to discriminate against interstate commerce—and for the reasons above the ITC does not—but "discrimination" simply does not encompass the broad "tax-neutral decision making" requirement that Respondents suggested below.

2. Moreover, even a quick look at the wide variations among state tax systems shows why it would be problematic for the Court to expand its negative Commerce Clause jurisprudence to include such a requirement. States tax corporations in a wide variety of ways. Consistent with the Commerce Clause, States may, for example, use a single-factor apportionment test, rather than the traditional three-factor test. See *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 269 (1978). Alternatively, States may employ a so-called Value Added Tax or VAT, rather than a traditional income-based franchise tax. See *Trinova*, 498 U.S. at 361. And even among those States that use a traditional income-based franchise tax, and employ the traditional three-factor apportionment formula, the States may vary the weights they assign each factor. Compare, e.g., CAL REV. & TAX. CODE § 25128 (weighting the sales factor as 50 percent of business income) with 72 PA. CONS. STAT. § 7401 (weighting the sales factor as 60 percent of business income). Finally, of course, States are free to elect not to impose corporate taxes at all, a choice four States (Nevada, South Dakota, Washington, and Wyoming) currently make.

The existence of these widely varying approaches to corporate taxation, of course, completely forecloses strict tax-neutrality. Whether Ohio offers an ITC or not, a company deciding whether to locate a plant in Ohio or Nevada would not face the tax-neutral decision that Respondents envision. That is so because Nevada does not tax corporations at all, so Nevada retains an advantage over any nonzero Ohio tax. Against this backdrop of inherent non-neutrality, all that the ITC does is potentially change the precise calculus of the tax-based comparison between the States.

Indeed, the only way to achieve the "tax-neutral decision making" that Respondents argued for below would be for the Court to find that the Commerce Clause requires absolute uniformity among the States with regard to their corporate tax systems. Of course, this would represent an unprecedented federal intrusion into the States' sovereign authority over their taxes, an intrusion wholly inconsistent with the federalist system our Constitution adopts. Moreover, it would deprive the States of the necessary flexibility to structure their tax systems to appropriately respond to their own unique characteristics and concerns. See, e.g., *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 297 (1998) ("Because state legislatures must draw some distinctions in light of local needs, they have considerable discretion in formulating tax policy.").

3. Finally, the decision below may hinder rather than advance tax-neutral decision making. The court below seemed to suggest a potential line between those credits that merely forgive the "new" taxes associated with an investment, and those that forgive some portion of the "pre-existing" tax liability, with the latter violating the Commerce Clause. See Pet. App. 13a. And this line, to the extent the court was in fact drawing it, may have arisen from some notion of tax neutrality. The best a competing State can offer, the argument would go, is to impose no taxes on the new plant, while Ohio can offer both no taxes on the new plant and a reduction in the company's already-existing tax liability. Thus, by preventing Ohio from using the "pre-existing liability," the argument asserts, we foster tax-neutral decisions.

The problem with this argument is that it simply ignores the way in which state taxes really work. Ohio uses the traditional three-factor apportionment formula. Under that formula, putting a new plant in a different State would lower the Ohio portion on two of the three apportionment factors: property and payroll (assuming the new out-of-state

plant employs workers). Thus, putting the plant outside the State would lower the percentage of the company's total income attributable to Ohio. All else equal, that would reduce the firm's Ohio tax bill. In such circumstances, limiting Ohio to offering only a credit for the "new taxes" may in fact put Ohio on an uneven playing field in competing with other States for the new plant. That is, under Ohio's apportionment formula, if Tennessee offered an Ohio company "no taxes if you put your new plant here," placing the plant there could (1) lower the company's Ohio tax bill without (2) creating *any* Tennessee taxes. But Ohio would be limited to offering "no additional Ohio taxes"—a less advantageous tax deal for the company. That would place Ohio at a competitive disadvantage, hardly the goal that the Commerce Clause seeks to foster.

Of course, how the numbers actually work in a given case will depend on the precise numbers involved. The point is merely that notions of "tax neutrality," even if they were part of the constitutional landscape, do not justify creating an artificial distinction between "new taxes" and "pre-existing liabilities."

The only appropriate inquiry is whether the ITC either provides a benefit to Ohio companies by burdening out-of-state competitors, or seeks to penalize Ohio companies for engaging in interstate commerce. Because the ITC does neither, it is entirely consistent with the mandates outlined in the Court's negative Commerce Clause jurisprudence.

E. Investment tax credits like Ohio's in fact promote Commerce Clause goals.

Far from violating the negative Commerce Clause, the ITC actually promotes its goals. As noted above, the Commerce Clause is concerned with increasing economic productivity, which it seeks to promote by preventing trade barriers. See *H.P. Hood & Sons*, 336 U.S. at 539. Similarly,

Ohio's ITC seeks to foster increased economic development without burdening interstate commerce. Companies receive a tax credit only for capital investment. Such investment by its very nature will increase economic productivity. And, consistent with the Founders' vision, the ITC promotes this goal without hindering anyone's access to Ohio markets, and without penalizing any current participant in that market for exercising their right to leave.

In fact, Ohio's ITC, like others around the country, has been very successful in achieving those Commerce Clause goals. Ohio officials estimate that corporate reliance on the ITC has resulted in $30 billion in new capital investment in the State. One commentator has estimated that across the country, credits themselves amounted to $50 billion, translating into hundreds of billions of dollars that businesses have invested in reliance on such credits. KENNETH P. THOMAS, COMPETING FOR CAPITAL: EUROPE AND NORTH AMERICA IN THE GLOBAL ERA, 158–59 (2000). Surely, holding ITCs unconstitutional now would be devastating to the "settled expectations" reflected in the widespread and substantial reliance on their constitutionality, yet another factor cautioning against striking the ITC here. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 317 (1992). See also *id.* at 319-20 (Scalia, J., concurring) (noting the importance of reliance interests). This is especially true given that Congress is free to act, as the Court has noted, if it considers the state ITCs to impose an undesirable burden on interstate commerce. *Id.* at 318.

Nor can Respondents make any headway by suggesting that the prohibition they seek would merely protect the States from themselves, and that the States would in fact be better off if none of them could offer such incentives, as then States would not need to compete on those grounds. See Cuno Resp. to Pet. for Cert. 5–6. First, the Court has never suggested that the negative Commerce Clause is designed to protect the States from competition. To the contrary, the

Court has said that such competition among the States lies "at the heart of free trade policy." *Boston Stock Exch.*, 429 U.S. at 337. See also *Bacchus Imps.*, 468 U.S. at 272 ("competition among the States for a share of interstate commerce is a central element of our free-trade policy"). Thus, it would turn the Commerce Clause on its head to now find that the Clause in fact insulates States from such competition.

Second, any such argument proceeds from the flawed assumption that the States compete only against one another. While that assumption may have been plausible 100, or even 50, years ago, it no longer is. Business capital is globally mobile. As various amici have pointed out, companies making investment decisions today are not merely comparing Ohio to Florida, but are also comparing both of these to Madrid, Mexico City, Mumbai and countless other destinations around the world. See, e.g., States' Amicus Br. 17–24. A decision preventing both Ohio and Florida from offering locational incentives thus merely serves to equally hamstring both in their efforts at global competition. The Court should resist any urge to turn the Commerce Clause—a Clause designed to foster economic production in the States—into an economic suicide pact. Such a result serves neither the Founders' vision nor the realities of today's global marketplace.

CONCLUSION

For the above reasons, the Court should vacate the decision below on the ITC for lack of standing, or, if standing exists, reverse that decision on the merits.

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DAIMLERCHRYSLER CORP.,

Petitioner,

v.

CHARLOTTE CUNO, et al.,

Respondents.

AND

WILLIAM W. WILKINS, Tax Commissioner etc., et al.,

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v.

CHARLOTTE CUNO, et al.,

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On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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INTRODUCTION

Recent years have seen a rapid proliferation of state and local tax breaks targeted to businesses that agree to locate in the state or locality. Ohio's two tax provisions that are challenged in this case, an investment tax credit against its corporate franchise tax and an exemption from personal property taxes for businesses that commit to specified local levels of investment and employment, are characteristic examples of this national trend. To the limited extent that such tax breaks actually affect business location decisions, they distort the free flow of investment in an open national economy. In fact, they only have minimal impacts on business decisions, largely because most jurisdictions offer comparable breaks. Nonetheless, they impose high costs on states and localities in lost tax revenues. The states are caught in a classic prisoners' dilemma which leaves all of them, their citizens who pay taxes and depend on services, and the national economy, all worse off.

This trend is the most recent iteration of one of the dangers that led to the enactment of the Commerce Clause. From experience with interstate trade rivalries under the Articles of Confederation, the Framers recognized the need for national controls so that the states would not seek to improve their parochial positions by taxation and regulation that advantaged in-state economic activity. Respondents seek to enforce this basic constitutional constraint on state taxation and to protect themselves and others from the injuries flowing from the states' escalating rivalry to enact discriminatory tax preferences favoring in-state business location. By upholding the Sixth Circuit, this Court can reaffirm its longstanding prohibition against discriminatory state taxation and guide state tax policy away from this most recent slide toward "economic Balkanization." *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).